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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES FIDELITY AND GUARANTY COMPANY

and

LEWIS O. FUNKHOUSER,
Petitioners,

v.

ST. JOHN MORTGAGE COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals deviated from this Court's decisions in *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986), and *Lujan* v. *National Wildlife Federation*, No. 89-640, 58 U.S.L.W. 5077 (June 26, 1990), and thereby distorted the summary judgment mechanism, by remanding a case for trial when neither the party opposing summary judgment nor the court of appeals set forth a legal theory identifying specific material facts at issue with respect to which the factfinder could find for the party opposing summary judgment.

PARTIES TO THE PROCEEDING

There are no parties to this proceeding other than those named in the caption.

STATEMENT PURSUANT TO RULE 29.1

United States Fidelity and Guaranty Company is a wholly-owned subsidiary of USF&G Corporation, a publicly traded corporation. United States Fidelity and Guaranty Company has no subsidiaries other than those wholly-owned.

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ST. JOHN MORTGAGE COMPANY, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners United States Fidelity and Guaranty Company ("USF&G") and Lewis O. Funkhouser respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unpublished, and is reproduced at App. 1a. The Order denying rehearing and rehearing in banc is reproduced at App. 12a. The opinion of the district court granting summary judgment is also unreported, and is reproduced at App. 14a.

The district court's opinion reconsidering and affirming the grant of summary judgment is reproduced at App. 28a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 13, 1990. A timely petition for rehearing was filed, and was denied on April 5, 1990. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The provisions at issue in this case are Federal Rules of Civil Procedure 56(c) and 56(e), which provide in relevant part as follows:

> (c) Motion and Proceedings Thereon. * * * The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *
>
> (e) Form of Affidavits; Further Testimony; Defense Required. * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The entire text of Rule 56 is set out in the Appendix at App. 36a.

STATEMENT

Petitioner United States Fidelity and Guaranty Company, a defendant in the trial court, is a Maryland insurance company. App. 16a. In 1986, Petitioner Lewis O. Funkhouser, also a defendant in the trial court, was an assistant vice president of USF&G. *Ibid.*

Respondent St. John Mortgage Company, Inc. ("St. John"), plaintiff in the trial court, is a corporation engaged in commercial real estate investment and financing. *Ibid.* From approximately the beginning of 1984 until the beginning of 1986, St. John and an unrelated entity ("Pennvest") jointly syndicated real estate properties. Pennvest was owned jointly by George E. Marucci and Donald L. Besecker. *Ibid.*

In early 1986, Marucci, acting on behalf of Pennvest and St. John, presented to Funkhouser an investment proposal relating to a portfolio of real estate, App. 17a, pursuant to which it was proposed that USF&G would "'purchase' * * * a $12,000,000 debenture." App. 22a (quoting letter of intent prepared by St. John). On February 27, 1986, representatives of USF&G, St. John and Pennvest and their lawyers met to discuss the St. John/Pennvest proposal. The parties agree that the St. John/Pennvest proposal was discussed at this meeting. *Ibid.* Their difference is that St. John claims that Funkhouser orally agreed on behalf of USF&G to enter into the proposed transaction, while Funkhouser and unrelated third-party witnesses testified that no agreement was reached, but rather that the parties would continue to negotiate in the hope that some agreement might be reached at a future time.[1]

There is no dispute that although documents designed to conclude the transaction were drafted, App. 18a, they were never finalized; and no document of any kind was ever signed by anyone. App. 20a. The proposed transac-

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[1] For purposes of this Petition, the factual dispute over whether the parties reached agreement is not material.

tion was not consummated, and St. John filed suit against USF&G and Funkhouser claiming breach of an alleged oral contract.

At the conclusion of discovery, petitioners moved for summary judgment, asserting that enforcement of the alleged oral agreement was barred by the Pennsylvania version of the Uniform Commercial Code's statute of frauds. 13 Pa.C.S.A. § 1206. That provision prohibits enforcement of an oral "contract for the sale of personal property." Petitioners took the position that the proposed transaction was the sale by St. John and the purchase by USF&G of a $12,000,000 bond; that a bond is personal property; and that as a result the statute of frauds applied and barred the relief sought. Petitioners based their defense on the documentation of the proposed transaction (which included a Bond Purchase Agreement), and on a mass of documentary and other evidence, including contemporaneous admissions by St. John that the proposed transaction was to be the purchase and sale of a bond.

Respondent St. John argued that § 1206 was inapplicable on the ground that the transaction contemplated by the parties was not a "sale," of personal property or anything else, but rather a "loan" of money "evidenced by a bond . . . and a bond purchase agreement." App. 22a. As the party seeking to enforce the alleged oral agreement, respondent had the burden of proving that the agreement was not covered by the statute of frauds. 16 Pennsylvania Law Encyclopedia § 93 ("[w]here the statute of frauds is pleaded against a contract, the party seeking enforcement of the contract has the burden of proving compliance with the statute or showing facts taking the cause out of the statute").

Although St. John based its opposition to USF&G's motion for summary judgment on the position that the transaction was a loan and not the sale of a bond, it did not offer in any of its papers before the district court—or later on appeal—any law stating or defining the dif-

ference between a loan and the sale of a bond. In addition, St. John did not point to any dispute about specific facts, the resolution of which would determine whether the transaction was or was not covered by the statute of frauds.

After what the court of appeals characterized as "an exhaustive review of the record" (App. 4a), the district court granted summary judgment in petitioners' favor, holding that "[t]here is no evidence in the record that the contemplated agreement was anything other than for a sale of a bond for $12,000,000." App. 22a. Respondent appealed, and the Court of Appeals for the Third Circuit reversed on the ground that the district court had erroneously focused on the way the transaction was documented "rather than [on] the substance of the transaction itself." App. 7a. Reference to the transaction's "substance," the court of appeals stated, might enable a factfinder to determine that the transaction was a loan rather than the sale of a bond.

Like respondent, however, the court of appeals did not provide any explanation of the "substan[tive]" difference between a loan and the sale of a bond. For that reason, the Third Circuit's opinion also did not identify any dispute about specific facts that the district court could resolve on remand to determine whether the transaction was a loan or the sale of a bond. Instead, the court of appeals held that summary judgment was foreclosed by respondent's general allegation that the transaction at issue was a loan and not the sale of a bond.

REASONS FOR GRANTING THE WRIT

In Direct Conflict With The Decisions Of This Court And Other Courts of Appeals, The Decision Below Prevents The Summary Judgment Mechanism From Working Properly By Barring The Entry Of Summary Judgment Even When No Legal Theory Is Before The Court Identifying Specific Facts As Material And Disputed

What factual dispute should the district court resolve on remand—what "substance," in the words of the court of appeals, should the district court look to—to determine whether the transaction at issue in this case is a loan or the sale of a bond? The briefs filed by respondent, in both courts below, cite not a single legal authority or theory explaining what must be a very subtle distinction between the sale of a bond, on the one hand, and on the other hand a loan exchanged for a promise to repay. The court of appeals' opinion similarly contains no such law, nor does it identify even a single specific fact in dispute on which the parties and the district court should focus on remand. Neither did the court of appeals point in even an abstract way to any characteristics that distinguish the two legal concepts. Instead, the court of appeals was satisfied with respondent's general allegation that the transaction at issue was a loan and not the sale of a bond, and therefore that the statute of frauds did not apply.

The court of appeals' rejection of summary judgment even in this prosaic setting—and even when it is not clear what the resulting trial is to be about—evidences a refusal to let the summary judgment mechanism perform its intended economizing function. "[S]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules which are designed to 'secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. Pro. 1). To achieve that goal, the de-

cisions of this Court clearly place upon the party opposing a motion for summary judgment "the burden * * * to set forth *specific facts* (even though they may be controverted by [the moving party]) showing that" the party opposing the motion could prevail. *Lujan* v. *National Wildlife Federation*, No. 89-640, 58 U.S.L.W. 5077, 5081 (June 26, 1990) (emphasis added).

Here, however, the party opposing the motion has offered no legal theory to distinguish material from immaterial facts. And for want of such a theory, respondent has identified no dispute about any specific fact, the resolution of which will enable the district court to decide whether the transaction at issue was a loan or the sale of a bond. Instead, the court of appeals has allowed respondent to defeat a summary judgment motion on the basis of nothing but a general allegation that the transaction at issue is not covered by the Pennsylvania statute of frauds.

1. *Respondent has offered the courts below no legal theory identifying material and disputed facts.* In *Anderson* v. *Liberty Lobby, Inc.*, this Court explained that "the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." 477 U.S. 242, 248 (1986). "[M]ateriality is * * * a criterion for categorizing factual disputes in their relation to the legal elements of the claim." *Ibid.*

This means that the burden on the party opposing a motion for summary judgment, of identifying a dispute about a material fact, necessarily encompasses the obligation to identify the legal theory under which he is proceeding and could win. Only after such a theory has been identified can it be possible for the party opposing the motion to identify a dispute about facts *which that theory makes material* and which a factfinder could resolve in his favor. See, *e.g.*, *Bushie* v. *Stenocord Corp.*,

460 F.2d 116, 119 (9th Cir. 1972) ("[t]he showing of a 'genuine issue for trial' is predicated upon the existence of a legal theory which remains viable under the asserted version of the facts, and which would entitle the party opposing the motion (assuming his version to be true) to a judgment as a matter of law") (citation omitted); *Holloway* v. *Pigman*, 884 F.2d 365 (8th Cir. 1989); *A.I. Root Co.* v. *Computer Dynamics, Inc.*, 615 F. Supp. 727 (N.D. Ohio 1985), aff'd, 806 F.2d 673 (6th Cir. 1986).

As each of these cases recognizes, a party can defeat a motion for summary judgment only by coming forward with a legal theory under which he could win, and then by showing that there is a dispute about a specific fact which that theory makes material. Only the Third Circuit appears to allow a party to defeat a summary judgment motion without imposing upon that party the obligation to come forward with a legal theory identifying specific facts as material.[2]

2. *Respondent has not identified any dispute about specific facts, the resolution of which would enable the factfinder to conclude that respondent was entitled to prevail.* This Court's decision in *Lujan* v. *National Wildlife Federation*, No. 89-640, 58 U.S.L.W. 5077 (June 26, 1990), makes clear that a plaintiff may not defeat a summary judgment motion with a general allegation that all the legal requisites of his claim are present.

[2] Indeed, respondent's brief to the Third Circuit in this case invoked that court's decision in *Gans* v. *Mundy*, 762 F.2d 338 (1985), for the proposition that "[t]he party *moving* for summary judgment has the burden of proof." 762 F.2d at 341 (emphasis added). *Gans*, of course, predates and is clearly inconsistent with this Court's decision in *Celotex*, *Anderson* and *Lujan*. Respondent's reliance on the case in spite of that fact reveals the true state of the summary judgment record. Unfortunately, it is also indicative of the court of appeals' view of the way the burdens on summary judgment should be allocated. That allocation of burdens is clearly wrong, and the Third Circuit's adherence to it in the wake of *Celotex*, *Anderson* and *Lujan* should be corrected.

Rather, under Federal Rule of Civil Procedure 56(e), the party opposing summary judgment must "set forth *specific facts* showing that there is a genuine issue for trial." *Id.* (emphasis added). "The object of this provision is not to replace conclusory allegations of the complaint * * * with conclusory allegations of" some other kind. *Lujan*, 58 U.S.L.W. at 5082. Yet in this case the court of appeals was satisfied with just such a conclusory allegation—that the transaction was not a sale—and it remanded for trial so that respondent could flesh out that conclusory claim with some as-yet unidentified "substance."

Under Rule 56 there can be no "presum[ption] that general allegations embrace those specific facts that are necessary to support the claim" of the party seeking to avoid the entry of a summary judgment. *Lujan*, 58 U.S.L.W. at 5082. The court of appeals' willingness to let respondent look for "substance" on remand is defensible only if respondent's "general allegation" that the transaction was a loan is sufficient to defeat a summary judgment motion. *Lujan* makes clear, however, that such a general allegation is not sufficient. At a minimum, therefore, this Court should vacate the decision of the court of appeals and remand for reconsideration in light of *Lujan*.

This discussion demonstrates that respondent has failed to carry either of the burdens imposed upon it by Rule 56. It has not set forth a legal theory identifying material facts, as required by Rule 56(c). And in breach of its duty under Rule 56(e), it has not pointed to a dispute about any specific facts, the resolution of which would enable the factfinder to conclude that respondent should prevail. As a result, the court of appeals' decision remands the case for a trial even though no-one yet knows what the trial is to be about, for no-one yet knows which facts—what "substance"—distinguish a loan from the sale of a bond.

Now, however, after the motion for summary judgment has been made and ruled on, respondent will get a second chance to come up with a legal theory that will identify "specific facts" that matter. On the basis of evidence about those as-yet unidentified specific facts, respondent can then seek to persuade the factfinder that the transaction here at issue was a loan and not the sale of a bond.

The procedure set out in Rule 56 was designed to prevent precisely this scenario. The time for respondent to come forward with a legal theory, and to point to a dispute about specific material facts, was when the motion for summary judgment was first made. Respondent did not carry that burden then. Rule 56 precludes a second chance.[3]

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[3] To be sure, the liberal pleading rule embodied in Federal Rule of Civil Procedure 8 gives courts the discretion to make their own investigation into the substance of a party's legal theory. But it does not free the party opposing a summary judgment motion from the duty to identify a genuine dispute about a specific material fact; and it therefore cannot free that party from the logically prior duty of identifying a legal theory that tells the court and his adversary which facts are material.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the case should be set for oral argument. Alternatively, the petition should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for reconsideration in light of *Lujan* v. *National Wildlife Federation*, No. 89-640.

Respectfully submitted,

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July 5, 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1388

ST. JOHN MORTGAGE COMPANY, INC.,
Appellant

v.

UNITED STATES FIDELITY AND GUARANTY CO. and
LEWIS O. FUNKHOUSER,
Appellees

On Appeal from the United States District
Court for the Eastern District
of Pennsylvania
(D.C. Civ. No. 87-4572)

Argued November 27, 1989

Before: SLOVITER and BECKER,
Circuit Judges and
LIFLAND, *District Judge* *

(Filed March 13, 1990)

Harold E. Kohn
Jeanne P. Wrobleski (Argued)
Kohn, Savett, Klein & Graf, P.C.
Philadelphia, PA 19107

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* Hon. John C. Lifland, United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

LIFLAND, *District Judge*

Plaintiff St. John Mortgage Company, Inc. ("St. John") appeals from the district court's grant of summary judgment to defendants United States Fidelity and Guaranty Company ("USF&G") and Lewis Funkhouser ("Funkhouser"). The district court held that even if an oral agreement existed between the parties, it was not enforceable in the absence of a signed writing, by virtue of two Pennsylvania statute of frauds provisions—13 Pa.C.S.A. § 1206, governing sales of personal property, and 13 Pa.C.S.A. § 8319, governing sales of securities. For the reasons set forth below, we reverse.

I.

St. John is a Delaware corporation engaged in real estate investment and financing. USF&G is a Maryland-based insurance company, and Funkhouser is a former Assistant Vice President of USF&G.

The parties agree that they met on February 27, 1986 to discuss the transaction which is at the heart of this lawsuit. Under the terms of the deal being discussed, St. John was to form a wholly-owned subsidiary, American

Sentry Corporation ("ASC"). USF&G would lend ASC $12 million. ASC would use the proceeds of this loan and of a first mortgage loan from an unrelated party to purchase fifteen parcels of real estate from St. John. ASC was to repay USF&G the principal, with interest at the rate of 17.125%, over a ten-year period. To secure payment of the loan, a Guarantee and Pledge Agreement was to provide that in the event of a default, USF&G would receive all the stock of ASC, thereby assuming control of that company and the properties. In addition, at the end of the ten year period, USF&G would receive an "equity kicker" of a specified percentage of the proceeds of the sale or refinancing of the properties or of the then appraised value.

While the parties agree on these basic terms of the deal,[1] they dispute the outcome of the February 27, 1986 meeting. St. John claims that Funkhouser orally agreed on behalf of USF&G to enter into the proposed agreement. USF&G and Funkhouser contend that no agreement was reached. According to USF&G and Funkhouser, the parties simply agreed to continue to negotiate in the hope that some agreement might be reached at a future time.[2]

Following the February 27, 1986 meeting, the law firm representing St. John began to prepare drafts of documents and to circulate them for review and comment. Between March 3 and March 7, 1986, an attorney from the firm prepared several drafts of a "Debenture," as well as a draft "Bond Purchase Agreement." None of these documents was ever executed.

On March 20, 1986, USF&G announced it would not participate in the deal. St. John responded by filing a

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[1] For purposes of their motion for summary judgment only, USF&G and Funkhouser conceded these provisions of the oral agreement. (30-36A).

[2] This court of course expresses no view as to the merits of this dispute.

three count complaint alleging breach of contract, fraud and civil conspiracy. USF&G and Funkhouser moved for summary judgment on all counts. By order dated December 22, 1988, the district court granted defendants' motion for summary judgment as to the breach of contract claim and denied the motion for summary judgment as to the fraud and conspiracy claims.[3] Our review of the district court's grant of summary judgment on the breach of contract claim is plenary. *Childers v. Joseph*, 842 F.2d 689, 693 (3d Cir. 1988).

II.

The basis for the grant of summary judgment on the breach of contract claim was the district court's conclusion that the transaction between the parties was the sale of a bond, that a bond is personal property under Pennsylvania law, and that enforcement of the transaction was barred by either 13 Pa.C.S.A. § 1206, the statute of frauds governing the sale of personal property, or 13 Pa.C.S.A. § 8139, the statute of frauds governing the sale of securities.

In concluding that the transaction was the sale of a bond, the district court conducted an exhaustive review of the record. However, it focused on the means the parties chose to memoralize the transaction rather than on the character of the transaction itself. For instance, the district court was impressed by the fact that one of the closing documents was to be a "bond." The district court also noted that St. John's complaint refers to a "proposed 'purchase' of a $12,000,000 debenture" and that the " 'debt would be evidenced by a bond . . . and a bond purchase agreement . . . .' " (619A). The district court's opinion also indicated that Mr. Sabat, a lawyer from the firm representing St. John, drafted a "Bond

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[3] The parties have stipulated to dismissal with prejudice of the claims for fraud and conspiracy, thus rendering the judgment final. 28 U.S.C. § 1291.

Purchase Agreement." *Id.* The district court quoted from Sabat's deposition testimony where he stated that "you normally have this type of document . . . in transactions of this type." *Id.* The district court further noted that the Bond Purchase Agreement referred to a "bond" and that it described USF&G as the purchaser of the bond. *Id.*

The district court also remarked that the parties themselves referred to the agreement as a bond. For instance, the court cited Sabat's deposition testimony where he stated that during the February 27, 1986 meeting he discussed the "bond purchase agreement." (619A-620A). The court referenced a letter in which Sabat stated that in order to close the proposed transaction "the new corporation must sell to an insurance company a very unique type of bond . . ." (620A). In addition, the district court's opinion noted that the minutes of St. John's Board of Directors meeting prepared by in-house counsel refer to the agreement as the "purchase [of] the debt instrument of a corporation." *Id.*

We agree with the district court that the parties intended the transaction to have the appearance of the purchase of a "bond." However, there is evidence which indicates that the real substance of the transaction may have been merely an agreement to make a loan, and the "bond" language may have been used by the parties for some other purpose. As the district court remarked:

> St. John structured the transaction in this way to permit USF&G to provide the financing in compliance with Maryland insurance regulations. The transaction was so structured because the Maryland insurance regulatory authorities would not permit USF&G to give St. John a loan secured by a second mortgage.

(666A). Having decided to formalize the deal in the form of the purchase of a bond, the parties spoke of the

transaction in those terms. And, not surprisingly, counsel drafted such documents as a Bond Purchase Agreement.

However, this does not resolve what we find to be a genuine issue of material fact as to whether the alleged transaction was the sale of a bond or was an agreement to make a loan, which is not within the Pennsylvania Statute of Frauds. The record indicates that the substance of the transaction may have been more than the mere sale of a bond. As noted by the district court, in a letter describing the transaction, Sabat did state that the transaction would require the sale "to an insurance company [of] a very unique type of bond." (64A-65A). In the same letter, he explained that the transaction would require extensive documentation because:

> (a) fifteen properties in seven states must be transferred and then mortgaged, (b) a new corporation must be created, qualified in seven states, and then acquire three other corporations, which will then be liquidated, (c) partnership interests must be transferred, and the partnership liquidated, (d) the new corporation must sell to an insurance company a very unique type of bond, and (e) the various persons involved in the aborted partnership syndication must decide among themselves how they will participate in the proposed financing.

(64A-65A). Many more documents than the Bond Purchase Agreement would have been required to close the transaction. In fact, Sabat estimated that over 450 separate documents would be necessary. The extent of the documentation required is reflected in the closing checklist.

The basic terms of the transaction alleged in this case were that USF&G would lend twelve million dollars to ASC, a subsidiary of St. John. The subsidiary would use the money to purchase several properties from St.

John. Principal and interest would be repaid to USF&G over a ten year period. Security for the loan was a guarantee and pledge agreement. ASC's debt to USF&G could have been documented as easily in a note purchase agreement as a bond purchase agreement. We feel that the district court focused too narrowly in confining its analysis to the memorialization of the transaction, i.e. the "bond" intended to document the transaction, and the parties' references to the "bond," rather than the substance of the transaction itself. Accordingly, the district court erred in concluding that the alleged transaction was, as a matter of law, the sale of a bond.

Having found a genuine issue of material fact as to whether the alleged agreement was a loan or a sale, we do not reach the question of what was "sold." There is no record before us on whether this is personal property or not. If the district court determines that there was an agreement to sell a bond, it must then determine whether this bond was personal property within the meaning of 13 Pa.C.S.A. § 1206.[4] If it is not, it would not fall under the statute of frauds.

III.

USF&G and Funkhouser also urge this court to hold that enforcement of the alleged oral agreement is barred by the Pennsylvania statute of frauds applicable to transactions involving a transfer of an interest in real estate, 33 Pa.C.S.A. § 1. While the parties briefed the issue below, the district court did not reach the issue of the statute's applicability. On review of the district court's grant of summary judgment, this court may consider grounds not evaluated by the district court. *Dandridge v. Williams*, 397 U.S. 471, 475 n. 6 (1969), *rehearing denied*, 398 U.S. 914 (1970).

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[4] In the briefs submitted to this court, both parties agreed that the proposed bond would not constitute a security under 13 Pa. C.S.A. § 8102. Brief of Appellants, pp. 21-25; Brief of Appellees, pp. 21-22 n.4.

The statute involving transfers of interests in land provides, inter alia:

> [N]o leases, estates or interests, either of freehold or terms of years, or any uncertain interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall, at any time after the said April 10, 1772, be assigned, granted or surrendered, unless it be by deed or note, in writing, signed by the party so assigning, granting or surrendering the same, or their agents, thereto lawfully authorized by writing, or by act and operation of law.

33 Pa.C.S.A. § 1.

USF&G and Funkhouser argue that the "equity kicker" provision in the agreement constitutes the transfer of an interest in land. The equity kicker provided that the parties would share in either the profits from the resale of the properties or the increase in appraisal value of the properties. If the properties were transferred or conveyed, the equity kicker entitled USF&G to a share of the proceeds of such a transfer or conveyance. In the event the properties were not transferred or conveyed before the maturity of the bond, the equity kicker provided for appraisal of the real estate, with USF&G entitled to a share in the appreciation of the properties.

We reject USF&G and Funkhouser's statute of frauds argument based on 33 Pa.S.C.A. § 1. The equity kicker is designed to operate with or without a transfer of an interest in land, and in any event its operation would be remote enough in time and value to make it more akin to an interest in future profits than to an interest in land.

USF&G and Funkhouser argue that there is a clear statement of Pennsylvania law compelling this court to hold that Pennsylvania's real estate statute of frauds bars enforcement of the proposed transaction. We disagree; Pennsylvania law appears to be to the contrary.

In *Everhart's Appeal*, 106 Pa. 349 at 354 (1884), the Supreme Court of Pennsylvania quoted with approval the rule previously announced in *Benjamin v. Zell*, 100 Pa. 33 (1882):

> [I]n *Benjamin v. Zell*, . . . we held that an interest in contingent profits arising from a sale of real estate to be made thereafter, does not amount to an interest in the land itself within the meaning of the Statute of Frauds.

In *Benjamin v. Zell*, plaintiffs sued to recover a portion of the profits realized by the defendant from the sale of a parcel of real estate. The court specifically noted that the alleged obligation to share the profits did not affect the title to the land. Plaintiffs' claim was found to be based on a contract for services, contingent on defendant's resale of the land at a profit. The court ruled that "(a)n interest in contingent profits arising from a sale to be thereafter made, does not give rise to an interest in the land itself." *Benjamin v. Zell*, *supra*, 100 Pa. at 37.

The Supreme Court of Pennsylvania has cited *Benjamin v. Zell* in later cases. *See Howell v. Kelly*, 149 Pa. 473 (1892); *McBride v. Western Pennsylvania Paper Co.*, 263 Pa. 345 (1919). However, in *Davis v. Hillman*, 288 Pa. 16 (1926), the Pennsylvania Supreme Court refused to enforce an oral agreement for contingent profits because the land had not actually been sold at a profit. The holding of *Davis v. Hillman* is that there was no cause of action because no profits were yet realized. *See* 288 Pa. at 22-23. Indeed, the Court specifically noted that there was no allegation that the defendant had disposed of the land at a profit or had in his possession any money to which the plaintiff was entitled. The Court did not indicate any intention to overrule *Benjamin v. Zell*; on the contrary, the opinion cites both *Benjamin v. Zell* and *Everhart's Appeal* with approval. *Davis v. Hillman* recognized that the statute of frauds barred a parol

agreement that created an interest in land, but did not refer to the language quoted above from *Everhart's Appeal* and *Benjamin v. Zell*, which established that an interest in land did not arise from an interest in contingent profits from the sale of land. Thus, *Davis v. Hillman's* application of the real estate statute of frauds can be fairly characterized as dictum, given the fact that the *Davis* court already had a clear basis for decision in the holding that there was no allegation of profits arising from the sale of the land in question. We have no doubt that the Supreme Court of Pennsylvania, if faced today with this question, would resolve it as we do, given the facts of this case, the well-established rules set forth in *Benjamin v. Zell* and *Everhart's Appeal*, and the absence of any expressed intention by the *Davis v. Hillman* court to overrule those cases.

We conclude that there is no Pennsylvania precedent supporting application of the real estate statute of frauds to bar enforcement of the proposed transaction. The equity kicker does not provide for conveyance to USF&G of any ownership, title or tenancy in any of the properties. No security interest in the property itself was reflected in the alleged oral agreement. At all events the operation of the equity kicker would be remote enough in time and value to make it more akin to an interest in future profits than to an interest in land. Accordingly, we hold that the equity kicker does not bring the alleged agreement within the purview of 33 Pa.C.S.A. § 1.

IV.

We conclude that the district court erred in holding that the alleged oral agreement was, as a matter of law, a contract for the sale of a bond. We further conclude that 33 Pa.C.S.A. § 1 does not present a bar to enforcement of the proposed transaction. Accordingly, the order of the district court will be reversed and the case re-

manded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1388

ST. JOHN MORTGAGE COMPANY, INC.,
Appellant

v.

UNITED STATES FIDELITY AND GUARANTY CO. and
LEWIS O. FUNKHOUSER

SUR PETITION FOR REHEARING

Present: SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, *Circuit Judges*, and LIFLAND, *District Judge* *

The petition for rehearing filed by Appellees United States Fidelity and Guaranty Company and Lewis O. Funkhouser

in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service

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* Hon. John C. Lifland, United States District Judge for the District of New Jersey, as to panel rehearing only.

not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s D. K. Sloviter
Circuit Judge

Dated: Apr. 5, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 87-4572

ST. JOHN MORTGAGE COMPANY, INC.

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY
and LEWIS O. FUNKHOUSER

MEMORANDUM

BRODERICK, J. December 22, 1988

Plaintiff, St. John Mortgage Company, Inc. ("St. John"), filed this action to recover compensatory and punitive damages for breach of contract, fraud and civil conspiracy on July 23, 1987. St. John alleges that defendant, United States Fidelity and Guaranty Company ("USF&G"), acting through Lewis O. Funkhouser ("Funkhouser") orally agreed to lend $12 million to a wholly owned corporate subsidiary of St. John, American Sentry Corporation ("ASC"). The purpose of the loan was to partially finance the proposed acquisition of fifteen parcels of real estate by ASC from St. John and St. John's partner, Pennvest Corporation ("Pennvest"). Based upon an oral statement made by Funkhouser at a February 27, 1986 face to face meeting of the parties, plaitiff alleges Funkhouser agreed that USF&G would make the $12 million loan. On March 20, 1986, USF&G advised St. John that USF&G would not make the loan. This lawsuit followed:

Plaintiff further alleges that the statements by USF&G and Funkhouser that USF&G would make the $12 million

loan constituted intentional material misrepresentations by the defendants. In addition, plaintiff alleges that the defendants intended that St. John would rely upon these misrepresentations and that St. John did so rely, to its detriment. Finally, plaintiff alleges that the defendants formed a conspiracy to engage in the wrongful acts described above.

On July 14, 1988, defendants filed a motion for summary judgment as to all of plaintiff's claims on the following grounds:

1) enforcement of the alleged oral agreement is barred by the statute of frauds; and

2) there is no evidence supporting plaintiff's claims of fraud and conspiracy.

I.

Summary judgment is appropriately entered when there is no genuine issue of material fact. Fed.R.Civ.P. 56(c). An issue is "genuine" only if a reasonable jury, considering the evidence presented, could find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, ——, 106 S.Ct. 2505, 2510 (1986). Under the Supreme Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986), the party moving for summary judgment has the initial burden of identifying evidence which it believes demonstrates the absence of a genuine issue of material fact. *Id.* at ——; 106 S.Ct. at 2553. "However, where the non-moving party bears the burden of proof, it must by affidavits or by depositions and admissions on file make a showing sufficient to establish the existence of every element essential to that party's case." *Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp.*, 812 F.2d 141, 144 (3d Cir. 1987). Thus, where the moving party has identified sufficient facts of record to demonstrate that no genuine issue of material fact remains, the non-moving party with the burden of persuasion cannot rest on mere denials to

withstand the motion for summary judgment. *Childers v. Joseph*, C.A. No. 87-3264 (3d Cir. March 22, 1988), slip op. at 10; *First National Bank of Pennsylvania v. Lincoln National Life Ins. Co.*, 824 F.2d 277, 282 (3d Cir. 1987).

II.

There are no genuine issues concerning the following material facts:

Plaintiff St. John is a Delaware corporation engaged in commercial real estate investment and financing. (Complaint ¶ 4.) From approximately the beginning of 1984 until the beginning of 1986, St. John and Pennvest jointly syndicated real estate properties. (Russell Dept. I,[1] p. 16.) At the time of the events alleged in the complaint (the first half of 1986), St. John was wholly owned by Gregory J. Russell ("Russell"). (Russell Dep. I, pp. 13-14, 57.) Pennvest was owned jointly by George E. Marucci ("Marucci") and Donald L. Besecker ("Besecker"). (Marucci Dep., pp. 4-6)

Defendant USF&G is an insurance company incorporated in with corporate headquarters in Maryland. In 1986, defendant Funkhouser was an Assistant Vice President of USF&G in the fixed income group of its investment department. (Funkhouser Dep. p. 20.)

In early 1986, Marucci and Phillip Leicht ("Leicht")[2] presented to Funkhouser an investment proposal relating to a portfolio of real estate consisting of seven Walmart stores (discount department stores) which were owned

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[1] Mr. Russell was deposed on February 25, 1988 and June 17, 1988. The transcript of February 25 is designated herein as Russell Dep. I, p. ——; the transcript of June 17 is Russell Dep. II, p. ——.

[2] Leicht was an employee of Kidder, Peabody & Co. with whom Funkhouser had done business. He introduced Marucci and Funkhouser and expected to receive a finder's fee if USF&G entered into the proposed transaction. (Leicht Dep., pp. 3, 96-97).

by St. John,[3] seven D'Lites Restaurants (fast food restaurants), and a strip shopping center (collectively, the "properties"). (Funkhouser Dep., pp. 85-88.)

On February 27, 1986, Funkhouser, Marucci, Besecker, Leicht and Edward H. Merves, Esq. ("Merves"), who was general counsel to St. John, met to discuss the St. John/Pennvest proposal.[4] Also attending the meeting were Russell, Richard Sabat, Esq. ("Sabat") of Morgan Lewis & Bockius in Philadelphia, representing St. John and Michael Silver, Esq. ("Silver") of Piper & Marbury in Baltimore, Maryland representing USF&G. The parties agree that the St. John/Pennvest proposal was discussed at this meeting. Plaintiff claims Funkhouser orally agreed on behalf of USF&G to enter into the proposed transaction, while Funkhouser and USF&G allege that no agreement was reached, but rather that the parties agreed to continue to negotiate in the hope that some agreement might be reached at a future time.

The material terms of the alleged oral agreement were as follows: St. John was to form a wholly-owned subsidiary American Sentry Corporation ("ASC"). ASC would use the proceeds of a first mortgage loan of approximately $12 million from an unrelated party, Provident National Assurance Company, and the proceeds of a $12 million loan from USF&G to purchase the properties. The $12 million principal due USF&G, and interest at the rate of 17.125%, was to be repaid to USF&G over a period of ten years. Interest and principal payments on both loans would be made from rents received from tenants of the properties. At the end of ten years, USF&G would participate in any profits from the sale or re-

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[3] St. John apparently held legal title to the Walmart stores although the title was "clouded" by agreements between St. John and Pennvest which had been filed of record in the jurisdictions in which the properties were situated. (Merves Dep., p. 77-79).

[4] Mr. Merves described the proposal as a "joint venture" of Pennvest and St. John. (Merves Dep., pp. 203, 224, 226.)

financing of the properties. To secure payment of the principal and interest, USF&G would receive a guarantee and pledge agreement from St. John pursuant to which USF&G could assume control over ASC in the event of default. The defendants concede the aforementioned facts for purposes of their motion.

At the conclusion of the meeting of February 27, 1986, all of the participants understood that Sabat would prepare drafts of documents and circulate them for review and response. (Merves Dep., pp. 182-183, 205.) Sabat estimated that upwards of four hundred and fifty separate documents would have to be created to "close" the transaction. (*See* Letter from Sabat to Russell and Merves dated March 3, 1986; Deposition Exhibit Merves 7). On March 3, 1986, Sabat sent the first set of his draft documents to USF&G, Pennvest, St. John and Piper & Marbury.

Between March 3, 1986 and March 7, 1986, Sabat prepared several drafts of a Debenture and a draft of a Bond Purchase Agreement, none of which was ever executed. In addition, Sabat began to engage in the task of preparing the many documents necessary to transfer the properties to ASC.

On March 13, 1986, Russell, Sabat, Marucci, Besecker and Leicht met in Baltimore with representatives of USF&G and Daniel Kohlhepp ("Kohlhepp"), a real estate consultant to "USF&G."[5] James Raley ("Raley") Senior Vice President at USF&G, called the meeting. (Raley Dep. p. 80). At the meeting Raley stated that USF&G was going to review the transaction between St. John and USF&G. Raley believed, at the conclusion of the meeting, that it was clear that USF&G would not go forward with the transaction. (Raley Dep. pp. 80-84). Sabat telephoned his office after the meeting to tell

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[5] Funkhouser did not attend the meeting.

them to stop work on the documents related to the transaction. (Sabat Dep. p. 139).

On March 20, 1986, Kohlhepp and Funkhouser advised Russell by telephone that USF&G would not go forward with the proposed transaction, and that there was no other way the transaction could be restructured. (Kohlhepp Dep. pp. 135-7).

On March 20, 1986, St. John agreed to assign the interests in the seven D'Lites properties to Besecker's and Marucci's company, Pennvest. The strip shopping center was also to be conveyed to Pennvest. As of that date, St. John still retained the seven Walmart properties. (Termination Agreement, Plaintiff's Exhibit "G").

Between March 20 and March 26, 1986, Funkhouser and Marucci discussed entering into a new transaction regarding only the Walmarts. On March 26, 1986, John C. Snyder, Esq. ("Snyder"), Marucci's counsel, sent to USF&G's counsel, Silver, a proposed draft debenture similar to the debenture considered in the St. John transaction (Plaintiff's Exhibit "H"). On the same date, Snyder also sent to Silver the identical St. John's Guaranty and Pledge Agreement, with Marucci's company, Pennvest Properties, Inc. substituted for St. John (Plaintiff's Exhibit "I").

On March 28, 1986, Russell, acting for St. John, signed an agreement to convey the Walmart properties to Pennvest (Defendant's Exhibit 10, p. 5). Russell and Merves learned at this time that USF&G had agreed to finance Pennvest's purchase.

On April 22, 1986, a subsidiary of Pennvest, Pennvest Investment Group, Inc. "(PIGI") purchased the Walmart properties from St. John for $15,685,000. At the same time, USF&G purchased a bond from PIGI in the principal amount of $16,200,000. (Plaintiff's Exhibit "K").). it

III.

It is undisputed that no written contract was ever signed by any party. Indeed, there is no signed document of any kind. In their motion for summary judgment, defendants have alleged that the alleged oral agreement was one for the sale of personal property of which enforcement is barred by the Statute of Frauds, 13 P.S. § 1206. In support of their motion, defendants have identified evidence demonstrating the absence of a genuine issue of material fact and that they are entitled to judgment as a matter of law. Thus, as previously stated, it is plaintiff's burden to come forward with "sufficient evidence [or every element of its claim" . . . for a jury to return a verdict for [plaintiff]." *Anderson v. Liberty Lobby*, 106 S.Ct. at 2511. Indeed, when as is the case here, discovery is completed, the Third Circuit, in *Cooley v. Pennsylvania Housing Finance Agency*, has stated:

> Federal Rule of Civil Procedure 56(c) compels the entry of summary judgment after adequate time for discovery against the party who has failed to make a sufficient showing to establish an essential element of his case.

830 F.2d 469, 474 (3d Cir. 1987).

In response to defendant's motion for summary judgment, plaintiff argues that the alleged oral agreement was "an oral agreement to lend money" and not an "oral agreement for the sale of personal property." In determing whether plaintiffs have met their burden by moving beyond mere denials and made a showing sufficient to establish the existence of every element essential to their case, we are of course, mindful that in the context of a motion for summary judgment, the trial court cannot resolve disputed factual issues. *White v. Westinghouse Electric Company*, No. 88-3157 (3d Cir. Nov. 25, 1988) slip op. at 12; *Rosenthal v. Rizzo*, 555 F.2d 390, 393 (3d Cir.), *cert. denied*, 434 U.S. 892, 98 St. Ct. 268

(1987). However, when the material facts, including the terms of the alleged oral agreement are undisputed except as to their legal significance and effect, summary judgment is appropriately granted. *See County of Erie v. American States Ins. Co.*, 573 F. Supp. 479, 483 (W.D. Pa. 1983), *aff'd*, 745 F.2d 45 (3d Cir. 1984); *Buford v. Wilmington Trust Co.*, 425 F. Supp. 525, 525 (E.D. Pa. 1976). More specifically, it is well established that "whether a transaction under a given state of facts as to which there is no dispute or conflict in the evidence is a contract within or without the statute of frauds is a question of law for the court." 37 C.J.S. Frauds, Statute of, § 290; *California Natural, Inc. v. Nestle Holdings, Inc.*, 631 F. Supp. 465, 467 (D.N.J. 1986); *see also Olympic Junior Inc. v. David Crystal, Inc.*, 463 F.2d 1141, 1144 (3d Cir. 1972).

In this diversity case, the parties agree that Pennsylvania law governs. Except for contracts involving the sale of goods or securities and except for security agreements, Pennsylvania law provides:

> a contract for the sale of personal property is not enforceable by way of action or defense beyond $5000 in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.

13 Pa. Cons. Stat. Ann. § 1206 (Purdon 1984).

Several commentators have stated:

> UCC § 1-206 is applicable to those kinds of personal property . . . that do not fall within Article 2, 8 or 9 because they are either goods or investment securities or secured transactions which are not covered by those other Articles.

A. Squillante & J. Fonseca, *The Law of Modern Commercial Practices* § 2:24 (1980). *See also*, 3 R. Dusenberg

& L. King, *Bender's U.C.C. Service* § 2.02[1] (1988) ("The history and official Commentary to the section indicates clearly that it is to apply to those contracts which otherwise would not be covered by Article 2 or Article 8; 70 Yale L.J. 603 (1961) (Section 1-206 applies to all contracts for hte sale of personal property which are not covered by the Statute of Frauds provisions in Article 2, Article 8 and Article 9.)

After a review of the full record before us, we conclude that the undisputed evidence in this case demonstrates that the alleged oral agreement was one wherby ASC would sell a bond to USF&G. There is no evidence in the record that the contemplated agreement was anything other than for a sale of a bond for $12,000.000. A bond is a sealed instrument whereby the obligor obligates himself to pay another a certain sum of money at a day appointed. P.L.E. Bonds § 1. Paragraph 13 of Plaintiff's complaint states that "On February 19, 1986, a letter of intent was prepared by St. John and sent to USF&G." This letter of intent refers to a proposed "purchase" of a $12,000,000 debenture by USF&G. Paragraph 18(d) of the complaint states that the "debt would be evidenced by a bond . . . and a bond purchase agreement. . . ." Sabat, plaintiff's lawyer at the time, drafted a "Bond Purchase Agreement." Concerning this bond purchase agreement, Sabat testified: "you normally have this type of document . . . in transactions of this type." (Sabat Dep. p. 67). In that draft agreement USF&G is described as "purchaser" of the bond. (Appendix to Defendants' Motion for Summary Judgment, Tab 8). Sabat testified that at the February 27, 1986 meeting, during which plaintiff alleges that oral agreement was made, he discussed the "bond purchase agreement." (Sabat Dep. p. 63). The bond drafted by Sabat contained the following notation at the top:

> THIS BOND HAS NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, AND THIS BOND MAY NOT BE OFFERED OR SOLD IN VIOLATION OF SUCH ACT OR THE RULES AND REGULATIONS THEREUNDER.

In a letter Sabat wrote to Russell and Merves on March 3, 1986 (4 days after the alleged oral agreement), he said that in order to close the proposed transaction "the new corporation must sell to an insurance company a very unique type of bond. . . ." (Appendix to Defendants' Motion for Summary Judgment, Tab 2). In documents prepared by plaintiff contemporaneously with the negotiations involving the alleged oral agreement the proposed transaction was referred to as the "purchase [by USF&G of] the Debenture". (Appendix to Defendants' Motion for Summary Judgment, Tab 11). On about April 23, 1986, after all of the events alleged in the complaint Merves (plaintiff's in-house general counsel) prepared the minutes of the Annual Meeting of the Board of Directors of plaintiff. In those minutes he referred to the alleged agreement as the "purchase [of] the debt instruments of a corporation." (Appendix to Defendants' Motion for Summary Judgment, Tab 10, at 4).

The sale of a bond is not a sale of goods, therefore the statute of frauds provision for goods (13 Pa.Cons.Stat. Ann. § 2201) does not apply. In this case, the proposed bond as described by the parties might very well meet the definition of "security" as set forth in 13 Pa.Cons. Stat. § 8102. The Court points out that "security" is defined in pertinent part as an instrument which:

> Is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment.

13 Pa.Cons.Stat. § 1802(a). It is obvious based on the undisputed facts in this case that the $12,000,000 bond

was not "of a type commonly dealt in upon securities exchanges or markets." The bond, however, appears to be a type "commonly recognized in any area in which it is issued or dealt in as a medium for investment." Thus, the "securities statute of frauds", 13 Pa.Con.Stat.Ann. § 8319, might well be applicable to the instant case.

One commentator has stated: "Securities not meeting the scope requirements of Article 8 would seem to be covered by Section 1-206 . . ." 1 W. Hawkland, U.C.C. Series § 1-206:01(3). In Pennsylvania, personal property includes stocks, bonds and cash. *See Estate of McKenna*, 340 Pa. Super. 105, 489 A.2d 862 (1985). Thus, if the bond was not a "security" within the definition of § 8102, it clearly would be covered under the catchall statute of frauds, 13 Pa.Cons.Stat.Ann. § 1206.

Thus, the Court has determined that the transaction, as described in the facts concerning which there is no genuine issue, is not enforceable on the basis of either § 8319 or § 1206 of 13 Pa.Cons.Stat.Ann. Accordingly, in the absence of a signed writing, summary judgment will be granted to the defendants as to the breach of contract cause of action.

IV.

The elements of a claim for damages based on fraudulent misrepresentation in Pennsylvania are that: 1) an actor makes a statement which is untrue; 2) the actor knew or should have known that the statement he or she made was untrue; 3) the actor made the untrue statement to induce the listener to rely on it; 4) the listener justifiably relied on the untrue statement; and 5) the reliance caused the listener to suffer damages. *Scaife Co. v. Rockwell-Standard Corp.*, 446 Pa. 280, 285 A.2d 451 (1971), *cert. denied* 407 U.S. 920 (1972); *Edelson v. Bernstein*, 382 Pa. 392, 115 A.2d 382 (1955).

The plaintiff, as the non-moving party, on this summary judgment motion, must be affidavits, depositions or

admissions on the record make a showing sufficient to establish the existence of every element of the fraudulent misrepresentation claim. *Equimark Commercial Fin. Co. v. C.J.J. Fin. Serv. Corp.*, 812 F.2d 141, 144 (3d Cir. 1987). The defendants, as the moving parties, on the other hand, have the burden of demonstrating clearly the absence of any genuine issue of material fact as to any element of the fraud and that they are entitled to judgment as a matter of law. The court cannot draw any factual inferences in favor of the moving party, and should not resolve a genuine issue of credibility. This principle is particularly apt where intent is an element of the cause of action because intent is generally inferred from the facts and conduct of the parties. *Associated Hardware Supply Co. v. Big Wheel Dist. Co.*, 355 F. 2d 114, 121 (3d Cir. 1966).

The parties clearly dispute whether Funkhouser intentionally induced the plaintiff to rely on his alleged statement that there was a deal. Since there are genuine issues of material fact relating to the elements of the fraud claim, defendant's motion for summary judgment will be denied.

V.

Under Pennsylvania law a civil conspiracy is "a combination of two or more persons to do an unlawful or criminal act, or to do a lawful act by unlawful means or for an unlawful purpose." *Landau v. Western Pennsylvania National Bank*, 445 Pa. 217, 224, 282 A.2d 335, 341 (1971). It is well established that a conspiracy cannot be based on an agreement between a corporation and its officers, agents or employees. *Realco Services, Inc. v. Holt*, 479 F. Supp. 880, 885 (E.D. Pa. 1979). A possible exception to the rule exists where the employees are acting beyond the scope of their employment or for their personal intrests. *Johnston v. Baker*, 445 F.2d 424, 427 (3d Cir. 1971).

At all times material to the subject of this case, defendant Funkhouser was an Assistant Vice President of defendant USF&G. There is no allegation that he acted outside of the scope of his employment. As a matter of law, therefore, under the facts alleged in this complaint, there can be no conspiracy between defendant Funkhouser and defendant USF&G. Accordingly, pursuant to Fed.R.Civ.P. 12(b)(6), the conspiracy count will be dismised without prejudice to defendant filing an amended complaint properly alleging a civil conspiracy under Pennsylvania law.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 87-4572

ST. JOHN MORTGAGE COMPANY, INC.

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY and
LEWIS O. FUNKHOUSER

ORDER

AND NOW, this 22nd day of December, 1988, for the reasons set forth in this Court's Memorandum of December 22, 1988,

IT IS ORDERED that defendant's motion for summary judgment on Count I of plaintiff's complaint is GRANTED; and

IT IS FURTHER ORDERED that defendants' motion for sumary judgment on Counts II and III, respectively, of plaintiff's complaint is DENIED; and

IT IS FURTHER ORDERED that judgment on Count I is entered in favor of defendants, United States Fidelity and Guaranty Company and Lewis O. Funkhouser, and against plaintiff, St. John Mortgage Company, Inc.; and

IT IS FURTHER ORDERED that Count III is DISMISSED without prejudice to plaintiff filing an amended complaint within twenty (20) days of the date of this Order.

/s/ Raymond J. Broderick,
RAYMOND J. BRODERICK
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 87-4572

ST. JOHN MORTGAGE COMPANY, INC.

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY and
LEWIS O. FUNKHOUSER

MEMORANDUM

BRODERICK, J. March 29, 1989

Plaintiff, St. John Mortgage Company, Inc. ("St. John"), filed this action on July 23, 1987 to recover compensatory and punitive damages for breach of contract, fraud, and civil conspiracy. On December 22, 1988, this Court entered an Order accompanied by a Memorandum granting defendants' motion for summary judgment on Count I (breach of contract) of St. John's complaint and denying defendants' motion for summary judgment on Counts II (fraud) and III (civil conspiracy), respectively, of plaintiff's complaint. In the Order, this Court dismissed the plaintiff's civil conspiracy claim without prejudice to plaintiff filing an amended complaint within 20 days because the pleadings failed to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6).

On January 9, 1989, St. John filed a Motion for Reconsideration of the Court's December 22, 1988 Order. St. John requested this Court to vacate its Order and to deny defendants' motion for summary judgment on Count I (breach of contract). St. John claims that nei-

ther the statute of frauds provision for personal property, 13 Pa. C.S.A. § 1206 (Purdon 1984) nor the statute of frauds provision for securities, 13 Pa. C.S.A. § 8319 (Purdon 1984), prevent it from enforcing its alleged oral agreement. St. John contends that the alleged oral agreement is an agreement to lend money and not an agreement for the sale of a "bond". St. John also contends that Count III, the civil conspiracy count, should not have been dismissed because defendant Lewis Funkhouser ("Funkhouser") allegedly acted outside the scope of his employment and because he was acting outside the scope of his employment, he could enter into a conspiracy with his employer, defendant United States Fidelity & Guaranty Co. ("USF&G")

The court has reconsidered its Order of December 22, 1988 and for the reasons cited below, has determined that plaintiff has failed to provide sufficient basis for the court to vacate or modify its December 22, 1988 Order.

I.

St. John contends that the alleged oral agreement was "an agreement to lend money" and not "an agreement to sell a bond." It is well recognized that a bond is a sealed instrument whereby the obligor obligates himself to pay another a certain sum of money at a day appointed. P.L.E. Bonds § 1. It is in effect a loan instrument. Based upon a review of the record before us, the Court has concluded that the undisputed evidence demonstrates that the alleged oral agreement was an agreement for the sale of a bond.

In *DeFillippo v. Ford Motor Company*, 516 F.2d 1313 (3d Circuit 1975), partners in an automobile dealership brought action against the manufacturer and others for antitrust violations and breach of contract. Ford argued that the alleged contract was unenforceable under the Pennsylvania statute of frauds because there was no signed writing. The critical issue was whether the sale

of the assets of an automobile dealership constituted a sale of "goods". The Third Circuit in *DeFillippo* in making its determination as to whether the contract was a sale of goods which was required to be in writing in accordance with the statute of frauds, 13 Pa. C.S.A. § 2201 (Purdon 1984), stated:

> Rather than a view of mechanical technicality or of mathematical nicety, a view of the reasonable totality of the circumstances should control the characterization of the contract for sale. . . . We believe it is preferable to utilize a rule of reasonable characterization of the transaction as a whole.

DeFillippo, 516 F.2d at 1323.

This Court utilized the rule of "reasonable characterization of the transaction as a whole" and concluded that the alleged oral agreement was an agreement for the sale of a bond.

In its Memorandum of December 22, 1988, the court listed the undisputed facts utilized in making its determination that the alleged oral agreement was an agreement for the sale of a bond on pages 3 through 8 and on pages 11 and 12. In addition, in its process of reconsideration, the Court also found that counsel for St. John, Mr. Sabat, and Mr. Raly, Senior Vice President of USF&G were in agreement (Sabat Deposition pp. 78-79; Raly Deposition pp. 177-178) that St. John specifically structured this transaction as the sale of a bond to be secured by a pledge of the assets of American Sentry Corporation ("ASC"), the wholly-owned subsidiary of St. John formed to complete the proposed real estate venture. St. John structured the transaction in this way to permit USF&G to provide the financing in compliance with Maryland insurance regulations. The transaction was so structured because the Maryland insurance regulatory authorities would not permit USF&G to give St. John a loan secured by a second mortgage. (Sabat Deposition, pp. 78-79; Raly Deposition, pp. 177-178).

Having determined that the alleged oral agreement was an agreement for the sale of a bond, the Court had no difficulty in concluding that such an agreement was not enforceable in the absence of a signed writing on the basis of either § 8319 or § 1206 of 13 Pa. C.S.A.

Second 8319 provides that a contract for the sale of securities is not enforceable unless there is some writing signed by the party against whom enforcement is sought (in this case, USF&G). 13 Pa. C.S.A. § 8319(1). The term "security" is defined in Section 8102 of 13 Pa. C.S.A. This section states that instruments must satisfy four requirements in order to qualify as a security. The Court has determined that the proposed bond transaction meets the four requirements of Section 8102(1) and qualifies as a security.

The first requirement of a security is that it is an instrument which is issued in bearer or registered form. 13 Pa. C.S.A. § 8102(1)(i). A security is in registered form when:

> it *specifies a person entitled to the security or to the rights it evidences* and when its transfer *may* be registered upon books maintained for that purpose by or on behalf of an issuer or the issuer so states.

13 Pa. C.S.A. § 8102(4) (emphasis added).
The proposed bond was in registered form. The proposed document states:

> American Sentry Corporation . . . . hereby promises to pay to United States Fidelity and Guaranty Company . . . .

Defendants' Exhibit 7, Memorandum in Support of Motion for Summary Judgment, p. 1. This language clearly specifies that USF&G was entitled to the bond. Although there is no explicit clause in the proposed bond document, the transfer of the bond "may" have been registered upon books maintained for that purpose.

The second requirement of a security is that it:

> is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment.

13 Pa. C.S.A. § 8102(1)(ii).

St. John ignores the second part of this requirement. There is no question that the proposed bond is commonly recognized as a medium for investment. Investments are the placing of capital or laying out of money in a way intended to secure income or profit from its employment. Under the proposed bond agreement, USF&G would advance American Sentry Corporation ("ASC") $12,000,000. ASC, in return, promises to pay USF&G:

> the principal amount of Twelve Million Dollars ($12,000,000) . . . . and to pay interest . . . . on the unpaid balance . . . . at the rate of . . . . (17.125%) per annum.

Defendant's Exhibit 7, p. 1.

USF&G would receive interest in exchange for the use of its money. The Pennsylvania courts have clearly recognized that the fact that an investment may not be easily transferrable or that the investment may not be as desirable an investment as one with less specific terms does not make it something other than a security. *Jennison v. Jennison*, 499 A.2d 302, 304 (Pa. Super. 1985). *Zamore v. Whitten*, 395 A.2d 435 (Me. 1978), which was relied upon by St. John in their Motion for Reconsideration, was explicitly rejected by the court in Jennison.

The third requirement of a security is that it:

> is either one of a class or series or by its terms is divisible into a class or series of instruments.

13 Pa. Cons. Stat. Ann. § 8102(1)(iii).

The proposed bond is indeed "one of a class". The terms of the proposed bond dictated that there could only be one bond in the class. The proposed bond document contained negative covenants which prohibited ASC from incurring *any other* indebtedness. Defendant's Exhibit 7, p. 9. This negative covenant makes the bond a unique, one-of-a-kind transaction meeting this requirement.

The fourth requirement of a security is that it "evidences an obligation of the issuer". 13 Pa. C.S.A. § 8102(1)(iv). The parties agree that the proposed bond document would evidence ASC's obligation to USF&G. There is no dispute that this requirement is met.

Having determined that the proposed bond qualifies as a "security", the proposed sale of the bond is not enforceable under Section 8319 of 13 Pa. C.S.A. in the absence of a signed writing.

For the reasons set forth in this Court's Memorandum of December 22, 1988, in the unlikely event that the alleged oral agreement was not considered an agreement for the sale of a security, the agreement would, nonetheless, be considered an agreement for the sale of personal property. Therefore, it would clearly be unenforceable in the absence of a signed writing under the "catchall" statute of frauds, 13 Pa. C.S.A. § 1206.

Accordingly, this Court's order of December 22, 1988, granting defendants' motion for summary judgment on the breach of contract count, shall remain in full force and effect.

II.

As this Court noted in its December 22, 1988 Memorandum Opinion, p. 15, under Pennsylvania law, a conspiracy cannot be based on an agreement between a corporation and its officers, agents or employees. *Realco Services, Inc. v. Holt*, 479 F. Supp. 880, 885 (E.D. Pa. 1979), unless the employees are acting beyond the scope of their employment. *Johnston v. Baker*, 445 F.2d 424,

427 (3d Cir. 1971). This Court dismissed Count III (conspiracy) pursuant to Fed. R. Civ. P. 12(b)(6), because the pleadings do not allege that Funkhouser was acting outside the scope of his employment. Having reconsidered its decision, the Court has determined that there is no reason to alter or amend its order of December 22, 1988 which dismissed the conspiracy count without prejudice to plaintiff filing an amended complaint within 20 days.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 87-4572

ST. JOHN MORTGAGE COMPANY, INC.

v.

UNITED STATES FIDELITY AND GUARANTY and
LEWIS O. FUNKHOUSER

ORDER

AND NOW, this 29th day of March, 1989, upon consideration of the Motion of plaintiff St. John Mortgage Company, Inc. for Reconsideration of this Court's Order of December 22, 1988, granting defendants' motion for summary judgment on Count I of the complaint; denying defendants' motion for summary judgment on Counts II and III, respectively, of plaintiff's complaint; and dismissing Count III for failure to state a cause of action without prejudice to plaintiff filing an amended complaint within twenty (20) days of the date of the Order; the Court having reconsidered its Order of December 22, 1988 and having determined that plaintiff has failed to provide a sufficient basis for this Court to vacate or modify its Order of December 22, 1988,

IT IS ORDERED that this Court's Order of December 22, 1988 shall remain in full force and effect.

/s/ Raymond J. Broderick
RAYMOND J. BRODERICK
J.

STATUTORY PROVISIONS

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motions. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy

and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of

the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.